

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

In the Matter of the Marriage of)	No. 62027-4-I
)	
MICHELLE GAMELIN,)	
)	
Respondent,)	
)	
and)	
)	
STEPHEN TUCKER,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: June 1, 2009
)	

Ellington, J. — Stephen Tucker appeals the trial court’s decision naming his former wife, Michelle Gamelin, as the primary residential parent of their two children. This is a highly discretionary determination, and the court did not err in its consideration of the relative abilities of the parents to provide a stable environment. There was no abuse of discretion, and we affirm.

FACTS

Michelle Gamelin and Stephen Tucker were married in 2000 and moved together into Gamelin’s home in Renton, which she had purchased prior to marriage. They soon decided to remodel the home, with Tucker, who has usually worked in the construction industry, doing the work himself.

Tucker started the remodel in March 2001. Initially, he continued to work on a few side projects for existing clients. Eventually, he focused entirely on the remodel and Gamelin became the exclusive financial provider for the family. The remodel was funded by Gamelin's income and loans from her father. Gamelin paid both the mortgage on the house and the mortgage on a house in West Seattle that Tucker uses as an office and storage place, which he had purchased before the marriage. Seven years later, in 2008, the remodel was still not complete, as "things just took longer than [Tucker] had anticipated."¹

The couple's first child, Ariana, was born on June 16, 2002. Several months thereafter, because the house was inhabitable, they moved, eventually living rent free in an apartment in Tucker's mother's home in Bellevue.

Before the birth of Ariana, Gamelin worked five days a week and earned a salary of \$84,000 per year. After a paid three month maternity leave, her employer reduced her workweek to two days, Mondays and Fridays, while continuing to pay her full salary.

When Gamelin returned to work, the parties agreed that Tucker should stay focused on the remodel. During the next year, friends and family cared for Ariana during the two days Gamelin worked. Thereafter, Tucker took over her care on those days.

The couple's second child, Christopher, was born September 30, 2004. After Gamelin's maternity leave, Tucker continued to care for the children on the two days

¹ Report of Proceedings (RP) (June 23, 2008) at 14.

Gamelin worked and devoted his remaining time to the remodel.

The remodel was never completed and the parties never returned to the Renton house. In July 2007, the parties separated and Gamelin moved out with the children. Under a temporary parenting plan, the children resided primarily with her and spent every other weekend from Friday until Monday evening, and in the alternating week, Monday overnight and Friday day, with Tucker.

After the parties' separation, Tucker continued to work on the remodel. To support himself, he also took some paid work, earning a total of \$6,000 in the first half of 2008. For four months, Gamelin paid Tucker \$750 monthly in temporary support. He also took several small loans from his parents (about \$9,000) and utilized a line of credit, on which he charged \$16,000.

Before trial, the parties agreed that Tucker would be awarded the Renton house, for which he would pay the mortgage (approximately \$1,600 per month), and would be required to refinance the home within 90 days in an amount sufficient to repay a total of approximately \$260,000 in debt. At trial, Tucker testified that he planned to sell the Renton home, then about 80 percent finished. He testified he was confident he could “significantly complete[]”² the remodel within one month, so he would not need to refinance.

The only issue before the court was the children's residential schedule. Gamelin sought to be designated as the primary residential parent for the children, then ages six and three, and proposed that they reside with Tucker every other

² RP (June 24, 2008) at 35.

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weekend plus two mid-week visits. The parties jointly proposed equal residential time

in the summer. Otherwise, Tucker sought to maintain the current residential schedule for approximately the next 18 months until September 2009, when Christopher would turn five, at which point Tucker asked for equal residential time on a schedule of alternating weeks.

Margo Waldroup, a licensed independent clinical social worker, performed a parenting evaluation. Her recommendation was consistent with Tucker's request.

At the end of trial, the court ordered that the children reside with Gamelin during the school year, except on alternating weekends, plus two mid-week dinner visits when they would be with Tucker, and reside with Tucker every weekend during the summer. In addition, each parent was to have two weeks of summer vacation with the children.

Tucker appeals.

ANALYSIS

A trial court has wide discretion in setting the terms of a parenting plan and its decision will not be reversed unless it was manifestly unreasonable or based on untenable grounds or reasons.³ A decision is manifestly unreasonable "if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard."⁴

³ In re Marriage of Littlefield, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997).

⁴ Id.

RCW 26.09.187 sets forth the criteria for establishing a permanent parenting plan. In establishing the residential schedule, the court considers seven factors:

- (i) The relative strength, nature, and stability of the child's relationship with each parent;
- (ii) The agreements of the parties, provided they were entered into knowingly and voluntarily;
- (iii) Each parent's past and potential for future performance of parenting functions as defined in RCW 26.09.004(3), including whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child;
- (iv) The emotional needs and developmental level of the child;
- (v) The child's relationship with siblings and with other significant adults, as well as the child's involvement with his or her physical surroundings, school, or other significant activities;
- (vi) The wishes of the parents and the wishes of a child who is sufficiently mature to express reasoned and independent preferences as to his or her residential schedule; and
- (vii) Each parent's employment schedule, and shall make accommodations consistent with those schedules.^[5]

The statute does not say how a court must weigh these factors, but it does say that the court must give the greatest weight to the first factor.⁶

The focus of Tucker's complaint is that the court declined to order equal residential time in summer as agreed between the parties, and for the entire year beginning when Christopher turns five some 18 months hence, in 2009, as requested by Tucker and recommended by the parenting evaluator. The court concluded from the evidence that Gamelin had carried the burden of "the more serious aspects of

⁵ RCW 26.09.187(3)(a).

⁶ Id.

parenting,”⁷ and that a major shift so soon would not be in the children’s best interests. The court also found that in order to meet his financial obligations, Tucker would have to hold full time employment. Tucker does not challenge this finding. The court therefore rejected the parties’ proposal for a 50-50 split of residential time in summer in favor of every weekend for Tucker: “I think it creates stability for Mr. Tucker in his work plans. I think it creates stability for the children in their summer plans.”⁸

Tucker contends the court acted contrary to the parties’ agreement, contrary to the parenting evaluator’s recommendations, and without proper consideration of the factors set forth in RCW 26.09.187(3) in an attempt to ensure that he would work full time for someone else. He contends the court penalized him for his past performance on the remodel and fashioned the residential provisions as a productivity program for him instead of adopting a schedule that would “accommodate” his work schedule.⁹ Further, he asserts the trial court only implicitly addressed the most important factor (the relative strength, nature, and stability of the child's relationship with each parent), and improperly applied a presumption in favor of the mother because she was the primary caregiver.¹⁰

The record does not support these contentions. It is undisputed that Gamelin

⁷ RP (June 27, 2008) at 6.

⁸ Id. at 7–8.

⁹ Br. of Appellant at 29.

¹⁰ See In re Marriage of Kovacs, 121 Wn.2d 795, 809, 854 P.2d 629 (1993) (chapter 26.09 RCW rejects any presumption in favor of the primary caregiver).

took greater responsibility for parental functions during the marriage. It is also undisputed that Tucker has good parenting skills and a strong relationship with the children. Gamelin opposed an equal residential schedule during the school year because of her concern that Tucker would not have the ability to focus and to provide structure for the children. She described Tucker as unrealistic about goals, financial obligations and time obligations, pointing to his failure to complete the remodel of the family home even though he worked on the project almost daily for six years. Gamelin believed that if Tucker were to work full time and care for the children, his stress level would “go up tremendously.”¹¹

The parenting evaluator also expressed concern about Tucker's organizational skills and focus. She testified that “when there are multiple demands for [Tucker], his stress becomes very high,”¹² and that he would find it extremely stressful to work full time and “get two kids ready and going in the morning.”¹³ She stated that whether Tucker’s lack of structure would ultimately affect his parenting was an “unresolved question.”¹⁴ Nonetheless, she recommended that residential time become equal when Christopher turned five, explaining that the most important factor was that the children “are equally emotionally invested in each parent.”¹⁵

Nothing in the record supports Tucker’s claim that the court overlooked the

¹¹ RP (June 24, 2008) at 66.

¹² RP (June 23, 2008) at 95.

¹³ Id. at 94–95.

¹⁴ Id. at 94.

¹⁵ Id. at 100.

strength of the parties' relationships with the children. Rather, the strength of both parents' relationships with the children was undisputed. There is also no indication that the court applied a presumption in favor of the primary caregiver. The court was left to focus upon the children's need for a stable environment and determine which of two good parents had the better present ability to provide it. In this determination it was hardly irrelevant which parent had demonstrated success in managing the daily challenges of parenting. Tucker's proposal to change the residential schedule 18 months hence actually demonstrated his lack of realistic judgment, given the ages of the children, the history and circumstances of the parents, and the certainty of change. The parenting evaluator's recommendation was largely inconsistent with her testimony.

Further, the court found, and Tucker does not dispute, that he must work full time to fulfill his financial obligations.¹⁶ He argues the court erred in presuming he will work Monday to Friday for an employer, instead of recognizing that self-employment provides him a flexible schedule. But self-employment has proved financially unworkable, and the court's skepticism in that regard, and its implicit expectation that Tucker will have to find full time employment, are supported by the evidence.

The trial court is given broad discretion in fashioning a parenting plan based upon the child's best interests at the time of trial and the factors set forth in

¹⁶ The parties agreed that Tucker will not pay child support. The parties will share extraordinary health care expenses, all out-of-pocket, agreed-upon expenses for the children, work-related day care, agreed-upon educational expenses, agreed-upon extracurricular activities, and insurance premiums.

RCW 26.09.187(3).¹⁷ We see no abuse of discretion here.

Tucker seeks costs and attorney fees on appeal. Whether a fee award is appropriate requires the court to consider the parties' relative ability to pay.¹⁸ The court also examines the arguable merit of the issues raised on appeal.¹⁹ The trial court declined to award fees, as do we.

Affirmed.

Edington, J

WE CONCUR:

Schindler, CT

Cox, J.

¹⁷ See In re Marriage of Jacobson, 90 Wn. App. 738, 745, 954 P.2d 297 (1998).

¹⁸ RCW 26.09.140; In re Marriage of Trichak, 72 Wn. App. 21, 26, 863 P.2d 585 (1993).

¹⁹ See State ex rel. Stout v. Stout, 89 Wn. App. 118, 127, 948 P.2d 851 (1997).